

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:	)	
	)	CG Docket No. 02-278
	)	
Petition of Stericycle, Inc., for Declaratory	)	CG Docket No. 05-338
Ruling and/or Waiver Regarding 47 C.F.R.	)	
§ 64.1200(a)(4)(iv)	)	

**PETITION OF STERICYCLE, INC., FOR DECLARATORY RULING AND/OR  
WAIVER REGARDING 47 C.F.R. § 64.1200(a)(4)(iv)**

Raymond J. Etcheverry  
PARSONS BEHLE & LATIMER  
201 S. Main St., Suite 1800  
Salt Lake City, Utah 84111  
REtcheverry@parsonsbehle.com

*Attorneys for Stericycle, Inc.*

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## **EXECUTIVE SUMMARY**

Stericycle, Inc.,<sup>1</sup> is currently the target of a putative class action lawsuit in which the plaintiff seeks to impose liability under the Telephone Consumer Protection Act of 1991 (“TCPA”) for the transmission of facsimile advertisements (“faxes”), including any fax solicited by the recipient. At the outset of this litigation, plaintiff William P. Sawyer, M.D., (“Sawyer”) asserts in his complaint that prior express consent is no defense to sending a fax with an insufficient opt-out notice. This position relies primarily on the Federal Communications Commission’s (the “Commission”) rules implementing the Junk Fax Prevention Act of 2005.

Sawyer’s strict-liability interpretation of the facsimile opt-out notice requirements arises from 47 C.F.R. § 64.1200(a)(4)(iv). This rule is unclear in its scope—it prescribes opt-out notice criteria for *unsolicited* faxes, while also purporting to police *solicited* faxes. If interpreted to regulate solicited faxes, Section 64.1200(a)(4)(iv) would wander well outside the TCPA’s circumscribed regulation of unsolicited faxes.

Accordingly, Stericycle respectfully requests that the Commission grant any of the following proposed relief: the Commission should (1) issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) does not apply to solicited faxes (i.e., those sent with the recipient’s permission or invitation); (2) the Commission should issue a declaratory ruling clarifying that 47 U.S.C. § 227(b) was not the statutory basis for implementing Section 64.1200(a)(4)(iv); or (3) grant Stericycle a retroactive waiver excusing compliance with Section 64.1200(a)(4)(iv).

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<sup>1</sup> As used herein, the terms “Stericycle, Inc.” and “Stericycle” encompass the following entities, all of which are named defendants in *Sawyer v. Stericycle et al.*, No. 1:14-cv-02070 (N.D. Ill.): Stericycle, Inc.; Stericycle Specialty Waste Solutions, Inc.; Stericycle Communications Solutions, Inc.; Stericycle Management, LLC; and Stericycle International, LLC.

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Pursuant to Section 1.2 of the Commission’s rules, 47 C.F.R. § 1.2, Stericycle, Inc., respectfully submits this Petition seeking a declaratory ruling clarifying that 47 C.F.R. § 64.1200(a)(4)(iv), which regulates “opt-out notices” on facsimile advertisements, does not apply to faxes sent with the express invitation or permission of the fax recipient. Because faxes sent with the recipient’s permission or invitation are *solicited*, they do not not run afoul of the Telephone Consumer Protection Act (“TCPA”),<sup>2</sup> which regulates only *unsolicited* faxes. In light of the plain language of the TCPA, as amended by the Junk Fax Prevention Act of 2005 (“JFPA”),<sup>3</sup> the Commission should formally adopt the foregoing interpretation of Section 64.1200(a)(4)(iv), which adheres to Congress’s intent to regulate only unsolicited fax advertisements.

If the Commission chooses not to grant the aforementioned declaratory relief, Stericycle alternatively requests a declaratory ruling that the Commission did not promulgate Section 64.1200(a)(4)(iv) pursuant to 47 U.S.C. § 227(b). The Commission should clarify that plaintiffs

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<sup>2</sup> 47 U.S.C. § 227 et seq.

<sup>3</sup> See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (hereinafter “JFPA”).

do not have a private right of action to pursue violations of Section 64.1200(a)(4)(iv), to the extent that rule regulates solicited fax advertisements.

Finally, Stericycle alternatively requests that the Commission grant a waiver, pursuant to 47 C.F.R. § 1.3, with respect to any fax transmitted by or on behalf of Stericycle to any fax recipient who provided prior express invitation or permission to receive the fax. Stericycle submits that the waiver should be retroactive to the date Section 64.1200(a)(4)(iv) took effect.

## **I. INTRODUCTION & BACKGROUND**

### **A. *Sawyer v. Stericycle, Inc., et al.***

Formed in 1989, Stericycle is a business that specializes in providing disposal services for medical and biohazardous waste materials. Its waste disposal services primarily benefit hospitals, laboratories, physicians, dental clinics, long-term care facilities, and numerous other businesses that require disposal of potentially infectious materials.

On March 25, 2014, plaintiff William P. Sawyer, M.D., (“Sawyer”) filed a putative class action against Stericycle in the United States District Court for the Northern District of Illinois. [See Complaint, ECF No. 1, *Sawyer v. Stericycle, Inc., et al.*, 1:14-cv-02070 (N.D. Ill. March 25, 2014) (hereinafter “Complaint”)]. The complaint alleges a single cause of action for violation of the TCPA, 47 U.S.C. § 227 et seq. (“Section 227”). [*Id.* ¶¶ 27-36].<sup>4</sup> The gravamen of Sawyer’s complaint is the assertion that faxes transmitted on Stericycle’s behalf contained opt-out notices that did not comply with the TCPA or the Commission’s implementing regulations set forth in Section 64.1200.

Specifically, Sawyer’s complaint advances the position that any fax containing a noncompliant opt-out notice necessarily results in liability under the Section 227. In Sawyer’s

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<sup>4</sup> More specifically, Sawyer’s claim for relief invokes the JFPA, which amended the TCPA in 2005.

view, faxes with noncompliant opt-out notices violate Section 227, even if they are transmitted to recipients who have expressly consented to receive faxes. Sawyer’s theory of liability rests primarily on the Commission’s 2006 Report and Order, which enacted Section 54.1200(a)(4)(iv).<sup>5</sup> Based on the Commission’s order, Sawyer alleges the following:

- “[t]he failure of a sender to comply with the Opt-Out Notice Requirements precludes the sender from claiming that the recipient gave ‘prior express permission or invitation’ to receive the sender’s fax”;
- “a sender of a faxed advertisement who fails to comply with the Opt-Out Notice Requirements has, by definition, transmitted an unsolicited advertisement under the JFPA”; and
- Stericycle is “precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements.”<sup>6</sup>

Sawyer drives home his strict-liability interpretation in the complaint’s proposed class definition:

All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendants, and (3) which did not display a proper opt-out notice.<sup>7</sup>

Sawyer’s definition makes no mention of *unsolicited* fax advertisements.

Sawyer’s complaint purports to expose Stericycle to liability for any fax with a noncompliant opt-out notice—even faxes that the recipient asked to receive. No congressionally enacted provision of the TCPA or JFPA can be interpreted to impose such liability. Only Section 64.1200(a)(4)(iv), adopted by the Commission, may be interpreted in this fashion.

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<sup>5</sup> See *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (hereinafter “2006 Report and Order”).

<sup>6</sup> See Complaint ¶¶ 30(D), 31, 32.

<sup>7</sup> *Id.* ¶ 19.

However, Sawyer’s interpretation of Section 64.1200(a)(4)(iv) is divorced from the plain language of the TCPA, as well as the congressional intent expressed in that statute.

**B. The TCPA and JFPA**

It cannot be overstated that TCPA and the JFPA regulate only unsolicited fax advertisements. Congress purposely chose to shower both Acts with repeated references to unsolicited advertisements, while not including a single reference to solicited or invited faxes.

The TCPA prohibits the “use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an *unsolicited advertisement*.”<sup>8</sup> An “unsolicited advertisement” is one made without the recipient’s “prior express invitation or permission, in writing or otherwise,” otherwise referred to as prior express consent.<sup>9</sup> Read together, the plain language of these two provisions confirms that (1) sending faxes to recipients who consent or invite the faxes (i.e., they solicit the faxes) is entirely lawful, and (2) sending faxes with a recipient’s prior express consent is *never* an “unsolicited advertisement” under Section 227.

In 2005, Congress enacted the JFPA to amend the TCPA’s fax provisions. Primarily, the JFPA added the “established business relationship” exception, under which it is permissible to fax “*unsolicited advertisement[s]* . . . from a sender with an established business relationship with the recipient” so long as the fax contains an opt-out notice meeting certain requirements.<sup>10</sup> The JFPA also amended Subsection (b)(2) of the TCPA, which outlines the Commission’s responsibility to “prescribe regulations” implementing the TCPA. *Id.* § 227(b)(2).

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<sup>8</sup> 47 U.S.C. § 227(b)(1)(C) (emphasis added).

<sup>9</sup> *Id.* § 227(a)(5).

<sup>10</sup> *Id.* § 227(b)(1)(C)(i) (emphasis added).

For instance, Congress instructed the Commission to “provide that a notice contained in an *unsolicited advertisement*” shall comply with the TCPA only if certain enumerated requirements are satisfied.<sup>11</sup> The amendment repeatedly referenced only unsolicited advertisements in prescribing opt-out notice requirements. Specifically, Congress ordered that the opt-out notice must, among other things:

- be “clear and conspicuous and on the first page of the *unsolicited advertisement*”;<sup>12</sup>
- state “that the recipient may make a request to the sender of the *unsolicited advertisement* not to send any future *unsolicited advertisements* to a telephone facsimile machine”;<sup>13</sup> and
- include “a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the *unsolicited advertisement*.”<sup>14</sup>

The JFPA further commanded the Commission to “provide, by rule, that a request not to send *future unsolicited advertisements* to a telephone facsimile machine complies” with the TCPA if, in part, the recipient’s “request is made to the telephone or facsimile number of the sender of such an *unsolicited advertisement*.”<sup>15</sup> The JFPA titled this amendment “Request to Opt-Out of Future *Unsolicited Advertisements*.”<sup>16</sup>

Further highlighting emphasis on unsolicited fax advertisements, Congress granted the Commission the authority to determine whether to “allow professional or trade associations that

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<sup>11</sup> *Id.* § 227(b)(2)(D) (emphasis added).

<sup>12</sup> *Id.* § 227(b)(2)(D)(i) (emphasis added).

<sup>13</sup> *Id.* § 227(b)(2)(D)(ii) (emphasis added).

<sup>14</sup> *Id.* § 227(b)(2)(D)(iv)(II) (emphasis added).

<sup>15</sup> *Id.* § 227(b)(2)(E)(ii) (emphases added).

<sup>16</sup> JFPA, Pub. L. No. 109-21, 119 Stat. 359.



are tax-exempt nonprofit organizations to send *unsolicited advertisements*.<sup>17</sup> Congress also directed the Commission to “submit an annual report . . . regarding the enforcement during the past year of the provisions of this section relating to sending of *unsolicited advertisements* to telephone facsimile machines.”<sup>18</sup>

In short, the TCPA and the JFPA repeatedly and consistently confirm that unsolicited fax advertisements are prohibited in certain circumstances, and that the Commission’s authority is cabined to adopting implementing regulations for unsolicited advertisements. Nowhere in the TCPA or the JFPA did Congress indicate a desire or intent to regulate fax advertisements sent pursuant to the recipient’s prior express consent. It could easily have done so, and its silence in this regard must be interpreted as intentional.

**C. The Commission’s 2006 Report and Order**

After the JFPA’s enactment, the Commission sought comment on proposed implementing regulations. In 2006, it issued a final order adopting numerous amendments to the Commission’s rules.<sup>19</sup> Among the amendments was the following provision:

(a) No person or entity may:

\* \* \*

(4) Use a telephone facsimile machine, computer, or other device to send an *unsolicited advertisement* to a telephone facsimile machine, unless —

\* \* \*

(iv) A facsimile advertisement that is sent to a recipient that has *provided prior express invitation or permission*

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<sup>17</sup> 47 U.S.C. § 227(b)(2)(F).

<sup>18</sup> *Id.* § 227(h).

<sup>19</sup> *See Report and Order*, 21 FCC Rcd 3787 (2006).

to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.<sup>20</sup>

The referenced paragraph—subsection (a)(4)(iii)—sets forth a litany of requirements for opt-out notices. That subsection, however, states that opt-out notices are to “inform[] the recipient of the ability and means to avoid future *unsolicited advertisements*.”<sup>21</sup>

Accordingly, Section 64.1200(a)(4)(iv) requires opt-out notices for unsolicited advertisements but also purports to require that solicited faxes must include compliant opt-out notices. Not only is the language of Section 64.1200(a)(4)(iv) ambiguous at best, it seemingly attempts to regulate solicited faxes, which are outside the scope of the TCPA and JFPA.

#### **D. The Rise in TCPA Litigation**

The TCPA has proven lucrative for plaintiffs’ attorneys and has resulted in a cottage industry for class actions. Although the TCPA does not indicate Congress intended for the statute to serve as a basis for class actions, such actions have proliferated, likely because the TCPA presents no overall damages cap. A statute once viewed as necessary to police unwanted telemarketing now serves as a threat to businesses operating in the United States, large and small, for technical violations that have little to no impact on consumers. As the Commission is certainly aware, TCPA class actions have proliferated and have exposed businesses to multimillion-dollar lawsuits.<sup>22</sup>

A recent tactic of plaintiffs’ attorneys is to target fax advertisements that contain noncompliant opt-out notices, regardless of whether the recipient consented to receive the fax.

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<sup>20</sup> 47 C.F.R. § 64.1200(a)(4)(iv) (emphases added).

<sup>21</sup> *Id.* § 64.1200(a)(4)(iii) (emphasis added).

<sup>22</sup> See Becca J. Wahlquist, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages*, available at [http://www.instituteforlegalreform.com/uploads/sites/1/Final\\_TCPA\\_White\\_Paper-1.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Final_TCPA_White_Paper-1.pdf) (listing multimillion-dollar TCPA settlements in 2012 and 2013).

In 2013, the Eighth Circuit addressed this “solicited fax” issue in *Nack v. Walburg*.<sup>23</sup> There, the plaintiff “consent[ed] to receive and then receiv[ed] the fax advertisement at issue,” but then brought a class action complaint for failure to include a satisfactory opt-out notice, citing Section 64.1200(a)(4)(iv).<sup>24</sup> The district court determined that this regulation applied only to unsolicited faxes, in part because the Commission’s 2006 Report and Order implementing the regulation stated that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”<sup>25</sup>

On appeal, the Eighth Circuit sought the Commission’s interpretation of Section 64.1200(a)(4)(iv). The Commission interpreted the regulation to “reach[] faxes for which the recipient had granted consent because consent, once granted, need not be interpreted as permanent.”<sup>26</sup> Although the Commission acknowledged the conflicting language in the 2006 Report and Order, it “did not attempt to explain . . . the inconsistent passage.”<sup>27</sup> The Eighth Circuit ultimately deferred to the Commission’s interpretation and further held that it lacked jurisdiction to determine whether the Commission had authority to promulgate the regulation.<sup>28</sup> Nevertheless, it offered the view that “it is questionable whether the regulation at issue (thus

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<sup>23</sup> 715 F.3d 680 (8th Cir. 2013).

<sup>24</sup> *Nack* addressed 47 C.F.R. § 64.1200(a)(3)(iv), a prior and identical version of the regulation at issue in this Petition.

<sup>25</sup> 715 F.3d at 684 (citing 2006 Report and Order).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 685-86 (discussing Hobbs Act and noting that a challenge to an FCC regulation as *ultra vires* must originate in a petition with the FCC).

interpreted [by the Commission]) properly could have been promulgated under the statutory section that authorizes a private cause of action.”<sup>29</sup>

**E. The Commission’s January 31, 2014 Public Notice**

On January 31, 2014, the Commission issued a Public Notice requesting comment on numerous petitions seeking declaratory and other relief with respect to Section 64.1200(a)(4)(iv).<sup>30</sup> According to this Public Notice, “[s]everal petitions have been filed seeking a declaratory ruling, rulemaking, and/or waiver concerning section 64.1200(a)(4)(iv) of the Commission’s rules, which requires fax advertisements sent to a consumer who has provided prior express invitation or permission to include an opt-out notice.” *Id.*<sup>31</sup> Since that Public

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<sup>29</sup> *Id.* at 682.

<sup>30</sup> See Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338, DA 14-120 (rel. Jan. 31, 2014).

<sup>31</sup> The Petitions subject to this Public Notice are: Petition of Forest Pharmaceuticals, Inc., for Declaratory Ruling and/or Waiver Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission’s Rules and for Declaratory Ruling Regarding the Statutory Basis for the Commission’s Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient’s Prior Express Invitation or Permission, CG Docket No. 05-338 (filed June 27, 2013); Petition of Staples, Inc. and Quill Corporation for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv) and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv), CG Docket Nos. 02-278, 05-338 (filed July 19, 2013); Petition for Declaratory Ruling and/or Waiver of Gilead Sciences, Inc., and Gilead Palo Alto, Inc., Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission’s Rules and for Declaratory Ruling Regarding the Statutory Basis for the Commission’s Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient’s Prior Express Invitation or Permission, CG Docket Nos. 02-278, 05-338 (filed Aug. 9, 2013); Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver, CG Docket Nos. 02-278, 05-338 (filed Aug. 19, 2013); Petition of Futuredontics, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver, CG Docket Nos. 02-278, 05-338 (filed Oct. 18, 2013); Petition of All Granite & Marble Corp. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver, CG Docket Nos. 02-278, 05-338 (filed Oct. 28, 2013); Purdue Pharma Petition for Declaratory Ruling Regarding the Statutory Basis for the Commission’s Opt-Out Notice Rule with Respect to Solicited Faxes, and/or Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) and (iv) of the Commission’s Rules, CG Docket Nos. 02-278, 05-338 (filed

Notice, the Commission has issued additional notices regarding similar petitions requesting declaratory relief and other relief with respect to Section 64.1200(a)(4)(iv).<sup>32</sup> Stericycle now brings this Petition and fully supports the petitions referenced in the Commission's public notices.

## **II. ARGUMENT**

Stericycle is the target of a putative class action lawsuit that seeks to impose liability for all faxes that do not include opt-out notices that fully comply with the Commission's rules.<sup>33</sup> Under Sawyer's theory of liability, Stericycle cannot defend itself by asserting as an affirmative defense that recipients consented to receive faxes. However, neither the TCPA nor the JFPA intended for businesses to fend off class actions alleging technical noncompliance in transmitting *solicited* faxes.

Accordingly, the Commission should grant any of following alternative requests for relief: (1) a declaratory ruling that Section 64.1200(a)(4)(iv) applies only to unsolicited fax advertisements, not solicited faxes; (2) a clarification that the Commission did not implement Section 64.1200(a)(4)(iv) pursuant to Section 227(b); or (3) a retroactive waiver excusing Stericycle from compliance with Section 64.1200(a)(4)(iv).

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Dec. 12, 2013); Petition of Prime Health Services, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver, CG Docket Nos. 02-278, 05-338 (filed Dec. 17, 2013); Petition of TechHealth, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver, CG Docket Nos. 02-278, 05-338 (filed Jan. 6, 2013).

<sup>32</sup> See Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338, DA-14-1734 (rel. May 30, 2014); Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338, DA 14-556 (rel. April 25, 2014); Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Crown Mortgage Company Petition Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338, DA 14-416 (rel. March 28, 2014).

<sup>33</sup> See 47 C.F.R. § 64.1200(a)(4)(iii) (listing opt-out notice requirements).

**A. The Commission Should Issue a Declaratory Ruling Clarifying that Section 64.1200(a)(4)(iv) Does Not Apply to Faxes Sent with the Express Permission or Invitation of the Recipient.**

The Commission should clarify that Section 64.1200(a)(4)(iv) applies only to unsolicited fax advertisements—i.e., it does not apply to faxes sent with the recipient’s prior express consent. The Commission should grant this request because (1) Section 64.1200(a)(4)(iv) is ambiguous at best, (2) the Commission lacks statutory authority to regulate solicited fax advertisements, and (3) a contrary interpretation would raise legitimate concerns under, and potentially violate, the First Amendment.

**1. The Language of Section 64.1200(a)(4)(iv) Is Ambiguous.**

“A regulation is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses”<sup>34</sup> or if it “can reasonably be interpreted multiple ways giving rise to multiple conclusions.”<sup>35</sup>

Section 64.1200(a)(4)(iv) states it is unlawful to use a fax machine “to send an unsolicited advertisement” to another fax machine “unless . . . [a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies” with the Commission’s rules. This regulation directs itself at unsolicited advertisements, but then purports to regulate advertisements that are *solicited*. Moreover, subsection (a)(4)’s use of “unless” anticipates a list of exceptions defining when unsolicited faxes are permissible, but subsection (iv) is not written as any kind of exception. As read from start to finish, Section 64.1200(a)(4)(iv) is confusing at best and certainly can be interpreted multiple ways by well-informed persons. It is ambiguous.

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<sup>34</sup> *Qwest Corp. v. Colo. Pub. Util. Comm’n*, 656 F.3d 1093, 1099 (10th Cir. 2011).

<sup>35</sup> *United States v. Levin*, 496 F. Supp. 2d 116, 120 (D.D.C. 2007).

Additionally, the Commission’s 2006 Report and Order implementing Section 64.1200(a)(4)(iv) states that it “amend[s] the Commission’s rules on *unsolicited facsimile* advertisements as required by the [JFPA].”<sup>36</sup> The Commission recognized that, “[i]n accordance with the [JFPA]” the Commission “amend[ed] [its] rules to require that all *unsolicited facsimile* advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements.”<sup>37</sup> Finally, the Commission stated that “the opt-out notice requirement *only applies* to communications that constitute unsolicited advertisements.”<sup>38</sup> All of these statements *by the Commission itself* are consistent with the text of the TCPA and the JFPA, which regulates only unsolicited advertisements. In contrast, no provision in the TCPA or JFPA purports to regulate—much less impose liability for—the sending of solicited fax advertisements.

Given the ambiguity in Section 64.1200(a)(4)(iv), the Commission should interpret the rule to adhere to the TCPA’s and JFPA’s concern with unsolicited advertisements—a concern the Commission itself recognized in its 2006 Report and Order.

## **2. Congress Did Not Grant the Commission Authority to Regulate Solicited Faxes.**

In the JFPA, Congress amended Section 227(b) to require the Commission to “prescribe regulations to implement . . . requirements” under the TCPA, including “provid[ing] that a notice contained in an *unsolicited advertisement* complies” with the TCPA if certain criteria are met.<sup>39</sup> The Commission’s authority to implement opt-out notice rules is therefore cabined to regulations

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<sup>36</sup> 2006 Report and Order, 21 FCC Rcd at 3788 (emphasis added).

<sup>37</sup> *Id.* at 3800 (emphasis added).

<sup>38</sup> *Id.* at 3810 n.154 (emphasis added).

<sup>39</sup> *See* JFPA, PL 109–21, 119 Stat 359; 47 U.S.C. § 227(b)(2)(D).



concerning only unsolicited advertisements.<sup>40</sup> Accordingly, the Commission should adopt Stericycle's proposed interpretation of Section 64.1200(a)(4)(iv) on the grounds that it is consistent with the Commission's scope of authority under the JFPA.

**3. A Contrary Interpretation Would Raise Substantial First Amendment Concerns.**

For a regulation of lawful and truthful commercial speech to survive First Amendment scrutiny, it must directly advance a "substantial" governmental interest and be "no[] more extensive than is necessary to serve that interest."<sup>41</sup> In implementing Section 64.1200(a)(4)(iv), the Commission did not identify a substantial governmental interest justifying the regulation of solicited fax advertisements. Moreover, the Commission made no showing that requiring solicited faxes to have compliant opt-out notices is "no[] more extensive than is necessary" to advance any alleged substantial governmental interest.<sup>42</sup>

Although the regulation of unsolicited advertisements may pass constitutional muster, any interest in curbing unsolicited advertisements cannot support the regulation of solicited advertisements. Indeed, the Eighth Circuit in *Nack* signaled that, although it had upheld the constitutionality of the TCPA's regulation of unsolicited faxes, the same might not be true with respect to any purported regulation of solicited faxes.<sup>43</sup>

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<sup>40</sup> See 2006 Report and Order, 21 FCC Rcd at 3791 ("On December 9, 2005, the Commission released a Notice of Proposed Rulemaking proposing modifications to the Commission's rules on unsolicited facsimile advertisements to implement the amendments required by the Junk Fax Prevention Act.").

<sup>41</sup> Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

<sup>42</sup> *Id.*

<sup>43</sup> *Nack*, 715 F.3d at 687 (explaining that in *Missouri ex rel. Nixon v. American Blas Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003), the court had held that "the TCPA's restrictions on commercial speech represented a sufficiently narrowly tailored restriction in pursuit of a substantial governmental interest," but that "the analysis and conclusion as set forth in *American*



Accordingly, interpreting Section 64.1200(a)(4)(iv) to regulate solicited advertisements would pose significant First Amendment concerns, and likely constitute an unconstitutional regulation of lawful and truthful commercial speech. Under general principles of interpretation, the Commission should avoid such an interpretation and clarify that Section 64.1200(a)(4)(iv) applies only to unsolicited advertisements.<sup>44</sup>

**B. *Alternatively, the Commission Should Issue a Declaratory Ruling Clarifying that Section 227(b) Was Not the Statutory Basis for Implementing Section 64.1200(a)(4)(iv).***

If the Commission declines to clarify the meaning of Section 64.1200(a)(4)(iv) as set forth above, the Commission should clarify that Section 227(b) was not the Commission's statutory basis for implementing the regulation. The Commission should issue a declaratory ruling with this clarification to ensure that an ambiguous rule that exceeds the scope of the JFPA and TCPA does not provide plaintiffs with a private right of action unintended by Congress.

In its 2006 Report and Order, the Commission did not identify the specific statutory basis for implementing Section 64.1200(a)(4)(iv). Rather, the Commission issued the order "pursuant to the authority contained" in a number of statutory provisions.<sup>45</sup> The Commission did not specifically identify Section 227(b) as the basis for its authority to implement Section 64.1200(a)(4)(iv), leaving open the possibility that this rule was adopted pursuant to some other authority. Indeed, Section 227(b)'s policing of "unsolicited advertisements" could not

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*Blast Fax* would not necessarily be the same if applied to the agency's extension of authority over solicited advertisements").

<sup>44</sup> See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

<sup>45</sup> 2006 Report and Order, 21 FCC Rcd at 3817 (listing "sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332; and sections 64.1200 and 64.318 of the Commission's Rules, 47 C.F.R. §§ 64.1200 and 64.318").

reasonably have formed the basis of a rule that purports to regulate solicited advertisements; the Commission's authority to implement such a rule must therefore lie elsewhere.

A clarification that Section 64.1200(a)(4)(iv) was not implemented pursuant to Section 227(b) would advance businesses' legitimate interest in communicating with individuals who have given their prior express invitation or permission to engage in advertising communications. A clarification also would further the interests of justice and fair treatment.<sup>46</sup> There is no fairness in exposing businesses to potentially devastating multimillion-dollar lawsuits on the basis of an ambiguous regulation that, under one interpretation, exceeds the outer bounds of congressional intent and authorization.

**C. Alternatively, Stericycle Should be Granted a Retroactive Waiver.**

If the Commission declines to issue the declaratory relief advocated above, Stericycle respectfully requests a waiver of compliance with respect to Section 64.1200(a)(4)(iv) for fax advertisements transmitted based on the prior express consent of the recipient or the recipient's solicitation of the faxes. Such a waiver would be retroactive to the effective date of the Commission's 2006 Report and Order implementing Section 64.1200(a)(4)(iv).<sup>47</sup>

The Commission may grant a waiver upon a showing that "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest."<sup>48</sup> Stericycle is currently a

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<sup>46</sup> Cf. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (explaining that the process for implementing rules is "intended to assist judicial review as well as to provide fair treatment for persons affected by a rule").

<sup>47</sup> See 47 C.F.R. § 1.3 (allowing for waiver of provisions for good cause shown); *In re United Telephon Co. of Kan.*, 25 FCC Rcd 1648, 1651 (acknowledging ability of an agency order to have retroactive effect).

<sup>48</sup> 47 C.F.R. § 1.925(c). The rule also allows waiver where, "[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable,

defendant in class action litigation in which the plaintiff relies heavily on the Commission's implementation of Section 64.1200(a)(4)(iv). Plaintiff's position is that Stericycle cannot raise prior express consent as an affirmative defense, even though the TCPA and JFPA govern only unsolicited fax advertisements. Applying Section 64.1200(a)(4)(iv) to Stericycle would not serve the underlying purpose of the Commission's opt-out notice rules, which, as recognized in the Commission's own 2006 Report and Order, were implemented to regulate only unsolicited fax advertisements.

Moreover, it is in the public interest to permit businesses such as Stericycle to assert prior express consent as an affirmative defense to any claim alleging an insufficient opt-out notice, and for businesses to pursue this defense to the fullest extent possible. Businesses should be permitted to transmit faxes, without complying with opt-out regulations, to recipients who have expressly consented to the receipt of faxes. The recipients' express consent to receive faxes demonstrates sufficient knowledge and ability to opt out of receiving faxes, regardless of the sender's strict compliance with the Commission's opt-out notice rules. In contrast, strict adherence to Section 64.1200(a)(4)(iv) incentivizes plaintiffs to pursue potentially devastating class actions based on technical violations of an ambiguous rule—even though Congress never expressed an intention in the TCPA or JFPA to permit a private right of action arising from solicited advertisements.

Accordingly, if the Commission declines to grant Stericycle's requested declaratory relief, Stericycle requests a retroactive waiver for compliance with Section 64.1200(a)(4)(iv).

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unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.” *Id.* Here, the action against Stericycle is in its early stages, and the factual circumstances are not yet ripe to raise this provision. Nevertheless, it is imperative for the Commission to expeditiously rule on the Petition to clarify the affirmative defenses available to Stericycle.

### III. CONCLUSION

For the reasons expressed herein, Stericycle requests the following alternative relief: (1) a declaratory ruling that Section 64.1200(a)(4)(iv) does not apply to faxes sent with the recipient's prior express consent; (2) a declaratory ruling that Section 227(b) was not the statutory basis for the Commission's implementation of Section 64.1200(a)(4)(iv); or (3) a retroactive waiver excusing Stericycle from compliance with Section 64.120(a)(4)(iv).

DATED: June 6, 2014.

Respectfully submitted,

PARSONS BEHLE & LATIMER

/s/ Raymond J. Etcheverry

Raymond J. Etcheverry  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, Utah 84111

*Attorneys for Stericycle*

**CERTIFICATE OF SERVICE**

I hereby certify that on the date identified below I caused a true and correct copy of the foregoing PETITION OF STERICYCLE, INC., FOR DECLARATORY RULING AND/OR WAIVER REGARDING 47 C.F.R. § 64.1200(A)(4)(IV) to be served via U.S. first class mail, postage prepaid, to the following:

ANDERSON + WANCA  
Brian J. Wanca  
Ryan M. Kelly  
3701 Algonquin Road, Suite 760  
Rolling Meadows, IL 60008  
Tel: (847) 368-1500  
Email: bwanca@andersonwanca.com  
rkelly@andersonwanca.com

I also hereby certify that on the date identified below I caused to be filed, by mail and by electronic service, the foregoing PETITION OF STERICYCLE, INC., FOR DECLARATORY RULING AND/OR WAIVER REGARDING 47 C.F.R. § 64.1200(A)(4)(IV) with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C. 20554.

DATED: June 6, 2014.

/s/ Adam E. Weinacker  
Adam E. Weinacker